IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MAKAME, J.A.; KISANGA, J.A.; and LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 56 OF 1995

AHAMADI CHALI.....APPELLANT

AND

THE REPUBLIC .....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Tabora)

(Katiti, J.)

Dated the 23rd day of June, 1995
in
Criminal Sessions Case No. 119 of 1992

JUDGEMENT OF THE COURT

11 November, 1999 & 8th June, 2006

MAKAME, J.A.:

The appellant, AHAMADI CHALI, was condemned to death by the High Court sitting at Tabora (Katiti,J.) and he is now appealing. At the trial the learned Judge agreed with the Lady Assessor and the two Gentlemen Assessors who sat with him, all of whom were of the opinion that the Appellant it was who killed the deceased, MESHAK DANIEL, a companion with whom he had gone to Kaliua in Urambo District where the Appellant's mother and younger brother were living and where the Appellant had gone to sell some salt. The Appellant agreed that he was in the deceased's company as alleged but he denied having had anything to do with the Deceased's death.

In the appeal before us Mr. Muna, learned advocate, appeared for the appellant while Mr. Mlipano, learned State Attorney, represented the Republic.

It was common ground that the appellant and the deceased spent the night at the appellant's younger brother's house upon their arrival at Kaliua village. The evidence accepted by the trial court was that the two, the appellant and the deceased, did this alone, and the appellant's assertion that they were in the company of PW2, PAULO HEDES, who had been 'housewarming' the house; and another person, was rejected. The appellant had asked PW2 and PW2's friend, Philbert, to go and find another shelter for the night as he, the appellant, and the deceased, would sleep with some women.

In his testimony PW2 further alleged that when he went back to the house on the morrow to collect his bed he found the door locked and it was not until the third day that he was able to locate the appellant, and when they went to the house and the appellant opened the door, alas, the bed was soiled with blood and there was also a lot of blood splattered on the walls and floor. The appellant said that the blood was that of a ten-year old girl whose hymen he had broken. PW2 would not buy that story, nor would his father, PW8, ELIAS MARKO, when he saw the bed.

The decomposed body of a person retrieved from a pit latrine some thirty five paces from the house was found to be that of the deceased, whose name according to a disinterested witness, PW7 Dr. Massam, the doctor who conducted a post mortem examination, was given as MESHAK by the appellant; the same person the appellant said had gone away from the village. PW7's testimony was that the deceased's head was covered over with a 'draft' shirt and the neck tied with a rope. The head was

bashed and pieces of bone had pierced and damaged the brain. The cause of death was given as Brain Injury.

The appellant told the Court of trial that in the house that night they were four: He and his friend who later left for Urambo, Paul Hedes and Paul's friend. The assertion is therefore that he was not alone with the deceased that night. He also said he did not identify the body and that he told the hymen fib at the Police Station so as to save himself from further assault.

Mr. Muna had two grounds in support of the appeal by his client. He submitted that the evidence against the appellant was merely circumstantial and that it was of a quality that would not reasonably lead to the conviction of the appellant; and that the learned Judge erred in accepting as credible the evidence of PW2, PW3 and PW8 who had interests of their own to serve. The three witnesses were Son, Mother and Father.

On behalf of the Republic Mr. Mlipano declined to support the High Court decision. He said he had "great difficulty to decide this"-to decide whether or not to support the conviction. Learned Counsel submitted that the learned trial judge misdirected himself during the course of his Summing -Up in that he made his own views known on certain matters and, to that extent, the trial was not a trial with the aid of assessors, in terms of section 265 of the Criminal Procedure Act.

We are grateful to both learned counsel for their useful assistance to the Court. Mr. Muna is quite right that the evidence relied on was purely circumstantial. We are, however, of the considered view that the learned trial judge meticulously considered such evidence and that, based on the accepted supporting facts; he was fully entitled to hold the

same view as that of his assessors that the appellant's guilt had been established. He also correctly warned himself, in his own colourful language, that although he was satisfied that the appellant had told lies, and that lies can be told for a variety of reasons, in this particular case it was because the appellant was trying to hide his guilt. The learned judge ably demonstrated his awareness of the case law on circumstantial evidence and cited a variety of authorities including KIPERUMI ARAP KOSKE AND ANOTHER (1949) 16 EACA 135. He took into account, quite properly in our view, the fact that the appellant was last seen alone with the deceased; the hymen story, which was an unblushing lie; and which he could not have told so as to save himself from further assault, as the appellant said, because he had first furnished the story to the youth, PW2, on the latter discovering the blood in the house, much earlier on, when there could have been no fear of people assaulting him, or assaulting him further. There was also his falsely saying that the deceased had travelled from the village; and his later conceding that the body fished out from the latrine was that of his guest. There was further a futile attempt by the appellant to implicate PW8, PW2's father, as being his companion-in crime.

With respect to the learned advocate for the appellant, we are not persuaded to agree that counsel had "almost covered Ground 2". The truth of the matter is that he did not really argue that Ground, but we are satisfied in any event that it is devoid of merit. Counsel merely remarked in passing that PW8 was also arrested, but we know the circumstances in which this happened, and we do not think that this in any way detracts from the soundness of the appellant's conviction. Lastly, with respect, we are of the view that Mr, Muna must have misread a portion of Dr. Massam's evidence to be able to assert so boldly that, at Page 17 Line 12, "Doctor says there was no violence in the room". At the said Line 12 the Doctor testified that "I estimated that six days had gone by because of

change of the organs and the place the body was". We are completely at a loss to understand how this could support learned counsel's contention. For the sake of argument, even if counsel's reference to Line 12 was merely lapsus linguae and that he actually wanted to refer to Line 20, that one goes thus: "At the scene there was no evidence of violence as to cause the impact demonstrated by the Deceased" (sic). This is neither here no there really. In Line 4 the doctor is loud and clear that "I never entered the Accused's house at all"; so that it is beyond peradventure that the doctor was not in a position to say that "there was no violence in the room", for what it would be worth.

We must confess to our being rather surprised by Mr. Mlipano's failure to support the conviction. As aforesaid, he submitted that the trial was held without the aid of assessors. In telling the assessors that "All the same, you will have no problem in concluding that the deceased was wearing a draft shirt and a black trouser" the learned trial judge was indeed rather indiscreetly sticking out his neck. However, we can fathom nothing in the assessors' opinions that would reasonably lead us to conclude, or fear, that this misdirection was crucial to their finding, and it does not appear to have influenced them. We wish to add that the colour of the garment the deceased's body was in might go some way to establishing the identity of the wearer, about which there is in the instant case ample other evidence to establish the deceased's identity. In answer to the Court Mr. Mlipano conceded two matters: One, that the above was the only misdirection in the Summing- Up; and two, that PW2 (the Prosecution star witness) is reliable. We are satisfied that the appellant's conviction was sound and so his appeal is here-by dismissed.

We wish to add two matters, the first one quite briefly; and the second one is, we think, of great moment:

The first one is, having expressed our surprise at the learned State Attorney's failure to support the conviction we wish to say that we were making the remark only with particular reference to this appeal, the way we were viewing it. For the avoidance of doubt, we should not be taken to intend to say that State Counsel should always resist appeals against the Republic, no matter the merit or lack of it. If after serious consideration and in keeping with professional ethics which are a trademark in our calling, State Attorney is of the view that he is not in a position to support a conviction, for that matter any decision, "in favour" of the Republic, he should feel free, and indeed feel obliged, to inform the Court, bearing in mind that he is an officer of the Court.

We wish to predicate the second matter with a little exposition, for the benefit of some people, including those who should know better, who may not be familiar with the process of the Court of Appeal in reaching a decision in a matter heard by three or more Justices of Appeal.

After hearing a matter there is normally a 'Conference' in Chambers where the Justices exchange views freely, respectfully, but seriously. Learned argument, and hammering out for consensus, take place. No bull-dozing, no arm - twisting. If there is dissent it is respected, not resented. If there is all - round consensus it is obtained that way. If there is no consesus there will prevail the majority view, and the written decision will so indicate. At such a Conference the Chairman of the panel is merely 'primus inter pares', and the only additional power he has is to assign a Justice, himself included, who will compose the decision, for the consideration of others. That decision, after approval by the others in that 'camp', is the decision of all those in that camp, owned by them and they are all responsible for it. Regarding such a decision it is therefore the height of blissful ignorance to label the composing Justice as 'liberal' or 'progressive' or 'conservative' etc. For all there is, such a Justice might

have started the Conference holding a diametrically opposite view and only been converted during the course of the Conference.

We thought it necessary to say the foregoing because of what we are now going to say. This appeal was heard by the usual panel of three Justices, including the late Lugakingira, J.A, R.I.P, the third among equals in the panel. Following the inevitable Conference there emerged complete consensus that the appeal had no merit and should be dismissed. This was after complete ventilation and the identification of reasons. After that, very unhappily, our learned brother, Lugakingira, J.A, died before the composition and signing of the judgement. This was new terrain for us, unchartered and unfamiliar. We however argue thus: Because all the three of us had agreed on the destination of the appeal, and on the reasoning steps to get there, the two of us felt that we could deliver the unanimous Judgement of the Court, which naturally cannot now be signed by our late learned brother. We feel that we are on firm ground. Further, we feel well-buttressed by this additional consideration: Even if Lugakingira, J.A had dissented and was still alive, or, as is now the case, he is dead, the two of us would still be the majority and so we would therefore carry the day. As it is, as we have said, the three of us had unanimously agreed to dismiss the appeal.

We searched for a precedent in Tanzania but our effort went unrewarded. The present situation is of course different from a part-heard matter, or a matter heard but eventually not discussed, which would call for a different treatment.

We did not confine our search to Tanzania. We spread out wider. One of us discussed the matter with eminent judges in some Commonwealth jurisdictions but was invariably informed that there was no recollected precedent. All those consulted held a view like the one we

have canvassed. We have also visited a number of websites in the United Kingdom, including the House of Lords, and, for interest, also in the United States, including the Supreme Court of the United States, and some State Supreme Courts, but our concerted effort was barren of fruit. We wish to recommend further research by our Court of Appeal and High Court Registries.

DATED AT DAR ES SALAAM this 8th day of June, 2006.

L.M. MAKAME
JUSTICE OF APPAEL

R.H. KISANGA
JUSTICE OF APPAEL

I certify that this is a true copy of the original.



S. M. RUMANYIKA
DEPUTY REGISTRAR